Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling That	)	**WC Docket No. 03-251**
State Commissions May Not Regulate Broadband	)	
Internet Access Services By Requiring BellSouth	)	
To Provide Wholesale Or Retail Broadband	)	
Service To CLEC UNE Voice Customers	)	
	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to the *Public Notice* released by the Federal Communications Commission (FCC) on December 16, 2003 and December 30, 2003, the National Association of Regulatory Utility Commissioners (NARUC), file comments opposing the December 9, 2003 Emergency Request for Declaratory Ruling filed by BellSouth Telecommunications, Inc. (BellSouth). NARUC also supports generally the comments and arguments filed by its member commissions in this proceeding. So far, four States - Florida, Kentucky, Louisiana and Georgia - have issued decisions that require BellSouth to cease withholding its FastAccess DSL service to customers who choose UNE-P carrier for their voice services. Moreover, the United States District Court for the Eastern District of Kentucky, on December 29, 2003, upheld the Kentucky Commission's decision in an arbitration proceeding between BellSouth and Cinergy Communications Company.[1] The opinion maintained the Kentucky Commission's authority to exert jurisdiction over local competition policy including the impact of Bellsouth's DSL service policy on such voice services. Specifically, the Court asserted that:

[1] *BellSouth Telecommunications, Inc v. Cinergy Communications Company, et.al*. 2003 U.S. Dist. LEXIS 23976 (E.D. KY).

> The 1996 Act incorporated a "cooperative federalism" whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership" (FN - Michigan Bell, 323 F.3d at 352.) Quite clearly the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements."

The Georgia Commission's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. §251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. (*U.S. District Court Eastern District of Kentucky. Mimeo at 15).* Granting BellSouth's Request for a Declaratory Ruling is simply not in the interest of competition and consumer choice. There is no question that it is anticompetitive and inconsistent with the goals of the 1996 legislation. The records compiled in each State commission's proceeding clearly indicate the chilling impact on customer choice of the BellSouth practice of withholding retail service. Any current BellSouth local phone customers that also have DSL service will be very reluctant to change voice providers if they cannot continue to use their DSL service.[2]

[2] BellSouth's practice capitalizes on customer avoidance of inconveniences caused by disconnection of its DSL service - including the hassle of "establish[ing] broadband service with a different provider, incur[ring] any connection fees, change[ing] his or her email address, and notify[ing] his or her contacts of that change." *Georgia PSC Order*, No. 11901-U, at 16 (citing Tr. at 25). Such inconveniences create a considerable disincentive to change local service providers. The evidence in Georgia's docket is compelling, suggesting more than 4,900 Georgia customers declined MCI's service because they did not wish to have BellSouth DSL Service disconnected. *See* MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 9 (filed Apr. 29, 2002) (citing Tr. at 38-39, 75). In Kentucky, Cinergy offered voluminous testimony describing crippling affects of this anti-competitive practice. When Cinergy customers call Bell South to ask about DSL service, BellSouth tells the customer that to secure DSL service from BellSouth, he or she must also subscribe to its voice service. (See Heck Direct at 5,9,36; Heck Revised Rebuttal at 25-26). The Florida PSC Staff concluded from witness testimony "that [BellSouth's] practice effectively keeps customers from switching" and that "BellSouth adopt[ed] its practice to keep customers from switching voice service." *Florida PSC Staff Recommendation*, No. 020507-TL, at 45. Testimony in all the State proceedings supports these conclusions. Small business customers, in particular, have been unwilling to consider another voice provider when they believed that switching from BellSouth's service might lead to a disruption in their email communications and Internet access. Many small and medium sized business customers, that lack cable modem access, are locked in with respect to their local service because they have no alternative. BellSouth is the only available broadband provider.

State Commissions are not trying to regulate Broadband Internet Access. State Commissions are following the requirements of the 1996 Act to open the way for competition in the local service market and provide choices for the consumers. BellSouth's requested Declaratory Ruling will stifle that competition.

BellSouth argues that under the 1996 Act's scheme of "cooperative federalism" and preexisting law concerning federal-state jurisdiction over communications services, the FCC has occupied the field and so the States have no authority to regulate the services at issue here. BellSouth is wrong on both counts.[3] Claims that the FCC has exclusive jurisdiction because jurisdictionally mixed services involve in part interstate communications ignore existing precedent. Even before the 1996 Act, that statement was true only for facilities and services used *exclusively* for interstate communications. But the FCC has never had exclusive authority when, as here, services and facilities carry *both* interstate and intrastate communications. *See Louisiana Pub. Serv. Comm 'n v. FCC*, 476 U.S. 355,373-76 (1986); 47 U.S.C. § 152(b). The PSCs have clear and exclusive authority over local telephony and the conditions limiting competition in the service. *See* 47 U.S.C. § 152(b). Sections 251-252, and the 1996 Act more generally, clearly preserve PSC authority to foster local competition in this fashion. *See* 47 U.S.C. § 251 (d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other

[3] Section 251(d)(3) permits the States to establish regulations that do not conflict with the requirements of section 251, and expressly precludes the FCC from impeding such regulations. This declaration of State authority is express and is not a grant of delegated authority that the FCC can usurp through declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in section 253(d). Section 251(d)(3) by its terms does not require all State access and interconnection regulations to be coextensive with the FCC's regulations published under section 251. Section 251(d)(3)(C) prevents the States from adopting regulations that would "substantially prevent" the opening of the ILEC's networks to competitive carriers under the Commission's orders. Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt pro-competitive regulations, even where the Commission has not done so. In fact, in the *Iowa Util. Bd v. FCC* (120 F.3d 806) arbitration, the Eighth Circuit Court of Appeals held that section 251 (d)(3) "constrains the FCC authority" to preempt State access and interconnection obligations. If BellSouth's arguments that the Commission "occupies the field" were to be accepted by the Commission under section 251(d)(2), the State authority preserved to "establish access obligations" under the section 251(d)(3) would be null and void.

requirements of State law in its review of an agreement"); *id*. § 261 (b) (preservation of State regulatory powers to fulfill requirements of local competition requirements); *id*. *§* 261 (c) (no preclusion of State regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"); 1996 Act, § 601(c), 110 Stat. at 14 (the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly* s*o provided* in such Act or amendments.") (uncodified note to 47 U.S.C. § 152) (emphasis added); *see also Michigan Bell Tel*. *Co*. *v*. *MFS Intelenet of Mich*., *In*c., 339 F.3d 428 (6th Cir. 2003); *AT&T Communications v*. *BellSout*h *Telecomms*. *Inc*., 238 F.3d 636, 642 (5th Cir. 2001); *MCI Telecomms*. *Corp*. *v*. *US West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); *CSX Transp., Inc*. *v*. *Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Even BellSouth does not argue that the Act expressly limits State actions such as the PSC's, and, there is no inconsistency between federal and State requirements that would support a finding of preemption. Moreover, Congress preserved State authority to impose additional regulations that would advance its efforts to optimize the development of the telecommunications market. Consequently, the Act maintains that States are within jurisdiction to establish and enforce regulations that are consistent with the pro-competitive provisions set forth by the Act, including unbundling provisions.

Based on the foregoing discussion, NARUC respectfully requests that the FCC deny the BellSouth Petition.

Respectfully submitted,

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